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October 13, 1993

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: MM Docket No. 92-3
RM-7874 and RM-7958

Dear Mr. Caton:

Submitted herewith for filing, on behalf of our client, Schuyler H. Martin, permittee of Radio Station KPXA(FM), Sisters, Oregon, are an original and nine (9) copies of his Reply To Opposition To Motion To Strike in the above-referenced proceeding.

Please direct any inquiries concerning this submission to the undersigned.

Respectfully submitted,

KAYE, SCHOLER, FIERMAN, HAYS &
HANDLER

By:

Irving Gastfreund

Enclosures

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

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OCT 13 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Amendment of Section 73.203(b)
Of The Commission's Rules
Table of Allotments
FM Broadcast Stations
(Prineville and Sisters, Oregon)

)
)
) MM Docket No. 92-3
) RM-7874 and
) RM-7958
)
)

To: The Commission**REPLY TO OPPOSITION TO MOTION TO STRIKE**

SCHUYLER H. MARTIN ("Martin"), permittee of Radio Station KPXA(FM), Sisters, Oregon, by his attorneys, pursuant to Section 1.45(b) of the Commission's Rules, hereby replies to the opposition to motion to strike filed in the above-captioned proceeding on October 12, 1993 on behalf of a group of radio broadcast licensees serving certain communities in and around Bend, Oregon (hereinafter collectively referred to as "Licensees").¹ In support whereof, it is shown as follows:

On August 9, 1993, Martin filed his Application For Review in this proceeding. On September 24, 1993, the Licensees filed

¹ Those licensees and their respective stations and communities are the following: Central Oregon Broadcasting, Inc. (licensee of KBND, Bend, Oregon; and KLRR, Redmond, Oregon); Redmond Broadcast Group, Inc. (licensee of KPRB and KSJJ, Redmond, Oregon); Highlakes Broadcasting Company (licensee of KRCO and KIJK-FM, Prineville, Oregon; JJP Broadcasting, Inc. (licensee of KQAK, Bend, Oregon); Oak Broadcasting, Inc. (licensee of KGRL and KXIQ, Bend, Oregon); Sequoia Communications (licensee of KICE, Bend, Oregon); and The Confederated Tribes of the Warm Springs Reservation of Oregon (licensee of KTWS, Bend, Oregon; and KTWI, Warm Springs, Oregon).

their Opposition To Application For Review, purportedly in response to Martin's August 9, 1993 Application For Review.

On October 8, 1993, Martin filed his Motion To Strike in this proceeding. Martin therein demonstrated that, under Section 1.115(d) of the Commission's Rules, an opposition to an application for review must be filed with the Commission within 15 days after the application for review is filed with the Commission. Accordingly, since Martin's Application For Review was filed with the Commission on August 9, 1993, any opposition to that Application For Review by the Licensee was required by Section 1.115(d) of the Rules to be filed with the Commission by no later than the close of business on Tuesday, August 24, 1993. Hence, Martin demonstrated in his Motion To Strike that, since the Licensees' Opposition to Martin's Application For Review was filed with the Commission on September 24, 1993, it was filed one month late, pursuant to Section 1.115(d) of the Commission's Rules, and must therefore be stricken in its entirety without consideration.

In their joint Opposition To Motion To Strike, the Licensees claim that their September 24, 1993 Opposition To Application For Review was timely filed. In this connection, the Licensees contend that, on September 2, 1993, the Commission's staff issued a Public Notice (Report No. 1963, Mimeo No. 34749) announcing the filing of Martin's Application For Review and affording

interested parties the opportunity to file oppositions to Martin's Application For Review by no later than 15 days after the date on which the September 2, 1993 Public Notice is published in the Federal Register.² The Public Notice was published in the Federal Register on September 9, 1993 (58 Fed. Reg. 47454 (September 9, 1993)).³ Accordingly, the Licensees contend that their joint Opposition To Application For Review was timely filed, since it was filed with the Commission within 15 days following September 9, 1993. The Licensees self-righteously assert: "we took the Commission at its word..." Opposition To Motion To Strike at 2.

The Commission did, indeed, issue Public Notice of the filing of Martin's Application For Review on September 2, 1993, and that Public Notice was, indeed, published in the Federal Register on September 9, 1993. However, examination of the text of the Public Notice makes it clear that it was improvidently issued and published in the Federal Register and that the Public Notice was not required to be issued or published. In this regard, the Public Notice expressly states that it was issued pursuant to the requirements of Section 1.429(e) of the

² A copy of the September 2, 1993 Public Notice was set forth as Exhibit A to the Licensees' Opposition To Motion To Strike.

³ A copy of the Federal Register publication of the Public Notice was annexed as Exhibit B to the Licensees' Opposition To Motion To Strike.

Commission's Rules. Section 1.429 of the Commission's Rules deals with petitions for reconsideration of a final action in a notice and comment rulemaking proceeding. Section 1.429(e) of the Rules states, in pertinent part, that:

"When a petition for reconsideration is timely filed in proper form, public notice of its filing will be published in the Federal Register. The time for filing oppositions to the petition runs from the date of public notice. See §1.4(b)."

Section 1.429 does not deal in any manner with applications for review, nor does Section 1.429(e) mention applications for review. Rather, applications for review are dealt with exclusively in Section 1.115 of the Commission's Rules. As noted above, under Section 1.115(d) of the Commission's Rules, an opposition to an application for review must be filed within 15 days after the date on which the application for review is filed with the Commission; no exceptions are provided to this clear requirement.

In light of the foregoing, it is clear that Section 1.429 of the Commission's Rules did not apply in any way to Martin's Application For Review in this proceeding. Accordingly, the September 2, 1993 Public Notice issued by the Commission's staff announcing the filing of Martin's Application For Review, purportedly under the authority of Section 1.429(e) of the Commission's Rules, was improvidently issued, since it is clear that that section of the rules does not apply to Martin's Application For Review. No Commission rule requires issuance of

a public notice or publication of a public notice announcing the filing of Martin's Application For Review.

Clearly, counsel for the Licensees, who is presumed to be familiar with the Commission's procedural rules, should have recognized that the Commission's staff improvidently and unnecessarily issued public notice of the filing of Martin's Application For Review, apparently under the mistaken belief that Martin's submission constituted a petition for reconsideration which would have been subject to the provisions of Section 1.429(e) of the Commission's Rules. Furthermore, counsel for the Licensees must be presumed to be aware of the unequivocal procedural requirements of Section 1.115(d) of the Commission's Rules, which requires the filing of all oppositions to all application for review within 15 days after the application for review is filed with the Commission.

Manifestly, the issuance of a Public Notice by the Commission's staff, which improvidently and erroneously treats Martin's Application For Review as if it were a petition for reconsideration, cannot properly be used as the basis for abrogating or superseding a clear and unequivocal procedural requirement contained in Section 1.115(d) of the Commission's Rules. Indeed, the issuance by the staff of a Public Notice cannot serve to abrogate or suspend the applicability of any Commission rule, particularly where, as here, it appears from the

face of the Public Notice that the issuance of the Public Notice was based on faulty factual assumption by the staff. It is well-established that the Commission is obligated to follow its own procedural rules.

Under these circumstances, and particularly in light of the presumed familiarity by counsel for the Licensees with the Commission's procedural requirements, it is difficult, if not impossible, to take seriously the Licensees' contention that they "... took the Commission at its word..." and filed their Opposition To Application For Review in reliance on the erroneously-issued Public Notice of September 2, 1993. This cavalier "tongue-in-cheek" approach to circumventing the clear mandate of the Commission's procedural rules should not be condoned by the Commission. Furthermore, under the circumstances, there is no basis in fact or in law, for the Licensees to claim that Martin's Motion To Strike rests "on a blatantly false premise" as to untimeliness.

As shown in Martin's previous submissions in this proceeding, late filings are not uncommon for the Licensees. Here, the Commission must enforce the clear procedural requirements set forth in Section 1.115(d) of its rules by summarily striking and dismissing the Licensees' Opposition To

Application For Review without consideration as late-filed.

Respectfully submitted,

SCHUYLER H. MARTIN

By: 

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His Attorneys

October 13, 1993

CERTIFICATE OF SERVICE

I, Mary Odder, a secretary with the law firm of Kaye, Scholer, Fierman, Hays & Handler, hereby certify that I have on this 13th day of October, 1993, sent copies of the foregoing Reply To Opposition To Motion To Strike by First-Class U.S. Mail, postage prepaid, or via hand-delivery, as indicated below, to the following:

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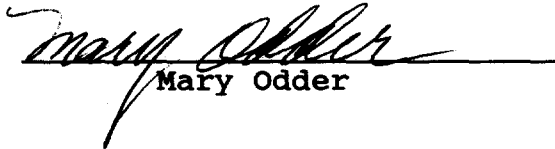
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*/ Via Hand-Delivery